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SUPREME COURT OF THE UNITED STATES

_____TERM, 1983

No. _____

THOMAS L. VARKONYI, INDIVIDUALLY AND d/b/a METAL RECYCLING COMPANY,

Petitioner,

vs

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITEDS STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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El Paso, Texas 79901
(915) 532-4440

QUESTIONS PRESENTED

1. If an employer, such as the petitioner Varkonyi is found by a court to have violated provisions of the Fair Labor Standards Act for not paying employees minimum wages and/or paying overtime work at one and one-half the regular rate;

A. Is it always an abuse of discretion for the court not to issue a restitutionary injunction pursuant to 29 U.S.C.217 as a sanction or punishment?

or

B. Should the trial court use discretion in granting or not granting restitutionary injunctive relief depending on the facts, circumstances and finding of each individual case?

2. If a trial court may use its discretion, should its ruling or decision be overturned on appeal when there is no showing of abuse of its discretion?

LISTING OF PARTIES

The parties are those captioned, ie.,

PETITIONER:

THOMAS L. VARKONYI. Individually and d/b/a METAL RECYCLING COMPANY, and who was Defendant in the original Trial Court Action, in the United States District Court for the Western District of Texas, and

RESPONDENT:

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor, and who was Plaintiff in the original Trial Court Action, in the United States District Court for the Western District of Texas.

Petitioner points out that the Trial Court did order the present respondent, plaintiff in the Trial Court to reimburse former employees of the petitioner herein, etc., however petitioner submits that those former employees are not "parties" in the context of the Supreme Court Rules.

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IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 1983

THOMAS L. VARKONYI, INDIVIDUALLY AND d/b/a METAL RECYCLING COMPANY,

Petitioner

vs.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

Petitioner respectfully petitions for a writ of certiorari to review the judgment or decision of the United States Court of Appeals for the Fifth Circuit No. 82-1013, dated March 24, 1983 concerning the same parties.

OPINIONS BELOW

JUDGMENTS OR DECISION

TRIAL COURT: Starting on page 1a of the appendix is reproduced the December 1, 1981 judgment of the trial court, in cause no EP 80-CA-164, in the United States District Court for the Western District of Texas, in which the Court rendered judgment against VARKONYI for money, and enjoined him from future violations of the Fair Labor Standards Act. The said 12/1/81 judgment did not contain a restitutionary injunction as to mony owed to former employees based on the court's finding that VARKONYI had not paid

them minimum wages, and that he had otherwise been violative of the Fair Labor Standards Act.

APPELLATE COURT: Starting on page 6a of the appendix is reproduced the March 24, 1983 opinion of the Appellate Court, in Cause no 82-1013, of the United States Court of Appeals, for the Fifth Circuit, in which the Court remanded down to the Trial Court ordering that a restitutionary injunction be issued, ie., overruling the Trial Court on the issue of a money type judgment against Varkonyi as opposed to a restitutionary injunction against him.

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

TRIAL COURT: Starting on page 16a of the appendix is reproduced the Findings of Fact and Conclusions of Law dated Nov. 3, 1981 made by the Trial Court in connection with its judgment of Dec 1, 1981 which is reproduced starting on page 1a of the appendix.

JURISDICTION

The final judgment of the trial court was timely appealed to the United States Court of Appeals for the Fifth Circuit. Upon adverse ruling a timely petition for rehearing was filed, and which was denied. This petition for writ of certiorari is being timely filed.

The Jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254 (1).

The decision sought to be reviewed with this petition for writ of certiorari is the March 24, 1983 opinion of the United States Court of Appeals for the Fifth Circuit.

Further, it is requested that the Court review the Fifth Circuit's denial of the petitioner Varkonyi's Petition for rehearing. The denial by the Fifth Circuit of the petitioner Varkonyi's Petition for rehearing did not contain any reasons for the said denial. It mearly denied any relief to the petitioner Varkonyi as to his petition for rehearing.

Petitioner Varkonyi respectfully submits that the said opinion of the Fifth Circuit dated March 24, 1983 and its denial of the petitioner Varkonyi's petition for rehearing were both erroneous.

CONSTITUTIONAL AND STATUTORY PROVISIONS

29 U.S.C. 201 et seq., and in particular, 29 U.S.C. 217, as follows:

§217 INJUNCTIVE PROCEEDINGS

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215, of this title, including in the case of violations of section 215 (a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which

employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title.

STATEMENT OF THE CASE

This petition seeks review of the court below's opinion, that is, the opinion of the United States Court of Appeals for the Fifth Circuit, dated March 24, 1983, which as to the issues in dispute, overruled the judgment of the trial court.

To summarize, the Trial court, while it found that the petitioner Varkonyi had violated various provisions of the Fair Labor Standards Act, did not issue a restitutionary injunction as the Secretary of Labor

had sought. Instead, the said trial court granted relief to the Secretary of Labor a money judgment in the sum of $28,522.54, and further restrained Varkonyi from future violations of the Fair Labor Standards Act.

Varkonyi does not even concede that the said judgment of the trial court was correct or even fair. The trial court did not consider the substantial amount of fringe benefits Varkonyi's employees received such as housing, etc., but in any event, to repeat, the trial court did not grant the Restitutionary injunction which the Secretary of Labor sought there in the Trial Court.

The Secretary of Labor appealed

thereafter, to the United States Court of Appeals, for the Fifth Circuit, taking the position that the Trial Court erred in not granting a restitutionary injunction against Varkonyi.

The Fifth Circuit did reverse the decision or judgment of the trial court to the extent that it remanded and ordered that there be such a restitutionary injunction issued against Varkonyi.

The said Fifth Circuit reversed as aforesaid largely upon its interpretation and citation of one of its own previous decisions, Donovan v. Brown Equipment & Service Tools,Inc., 666 F.2d 148 (5th Cir. 1982)

Jurisdiction lies in the Federal Courts inasmuch as the action started

in the United States District Court for the Western District of Texas, El Paso Division, and concerns violation or violations of Federal Statutes, the Fair Labor Standards Act, 29 U.S.C. 201 et seq.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The question is substantial

Whether or not a trial court has the discretion to grant a restitutionary injunction, pursuant to the provisions and authority of 29 U.S.C. 217, or to deny the granting of such a restitutionary injunction, all pursuant to the Fair Labor Standards Act, is a substantial question and issue.

If denying the granting of a

restitutionary injunction when there is found violations of the minimum wage and overtime provisions of the Fair Labor Standards Act is an abuse of discretion as stated in one part of the Brown decision, then the clear meaning and language of the statute (29 U.S.C. 217) is twisted and tortured. Further the holding and the law pronounced by the Fifth Circuit in its March 24, 1983 decision is contrary to established case decisions as summarized further on in this argument

The Decision Below of the Fifth Circuit is incorrect

A portion (and the applicable portion) of 29 U.S.C. 217 reads as follows:

> "The District Courts.....
> shall have jurisdiction, for
> cause shown, to restrain
> violations of section 215,
> etc., etc."

Clearly the statute itself restricts jurisdiction and power of the courts to issue restitutionary injunctive relief to those particular cases where "cause" is "shown" .

A long line of cases have held that the Federal Courts have broad discretion to grant or to deny injunctive relief in this area, including Lenroot vs. Kemp, CCA Miss. 1946, 153 F.2d 152; Mitchell vs Empire Gas Engineering co., CA Fla 1958, 256 F.2d 781; Chambers Construction Co. vs. Mitchell, CA Neb. 1956, 233 F.2d 717; Tobin vs Anthony Williams Mfg Co.,

CA Ark, 1952, 196 F.2d 547; Walling vs Panther Creek Mines, CCA Ill, 1945, 148 F.2d 604; Fleming vs Jacksonville Paper Co., CCA Fla 1942, 128 F.2d 395; Walling vs Hammer, DC Va 1947, 64 F Supp 690; Brennan vs Westinghouse Credit Corp., CA Tenn 1975, 509 F.2d 81, and countless other cases listed in footnote 17 to 29 U.S.C. 217.

Applying the foregoing law, the statute itself (29 U.S.C. 217), and the case law cited, the trial court denied any restitutionary injunctive relief. Petitioner submits that the said trial court did not find that "cause" was "shown" True, the trial court did find violations of the Fair Labor Standards Act, but again, its decision speaks for itself, and petitioner again submits that "cause" was not "shown" so as to

permit it to grant a restitutionary injunction, as the Secretary of Labor sought.

The Fifth Circuit reversed then based largely on the Brown case, cited previously.

Petitioner submits that the Fifth Circuit is in error and that it took one portion of the said Brown case completely out of context as a justification of its reversal of the Trial Court's Decision.

The Fifth Circuit's decision stated in part on page 3 of its 3/24/83 opinion,

> "In Brown Equipment, we held that the denial of a restitutionary injunction was an abuse of the court's small residue of discretion".

The court so stated as if that except was the law in general, and that such was the holding of the Brown case. Again the Brown case stood for no

such doctrine. A reading of the Brown case clearly shows that the Court in Brown made finding that with the factual setting and background in that (Brown) case, it was an abuse of discretion to deny a restitutionary injunction. The Brown case clearly accepted the general law that with a proper factual setting and background, a court using its discretionary power, could indeed deny restitionary injunctive relief.

Petitioner respectfully submits that the Fifth Circuit completely erred when it apparently found "cause" to be "shown", from no new facts or data, and completely misconstrued the Brown case to a holding it did not hold. The Court in Brown further held (which the 5th Circuit completely overlooked) on pp 157 (666 F.2d 148:

> "This is not to suggest that section 17 restitutionary injunctions should issue as a matter of course upon a finding of past wages due. Compare Wirtz vs Malthor, Inc., 391 F.2d at 3, (granting restitutionary injunction), with Brennan v Saghatelian, 514 F.2d 619 (denying restitutionary injunction). If for example, the employer is bankrupt, an injunction would be vain and the employer should not be threatened with citation for contempt and for not doing what he is unable to do."

Still further up in the Brown decision, the Court made it very clear that a lower court using its discretion could deny a restitutionary injunction (on page 155), and that such a restitutionary injunction as well as other relief should be granted only if appropriate. McComb v Frank Scerbo & Sons, 177 F.2d 137

In another area, the fifth circuit made an error when it surmised on page

four that Varkonyi's bankrputy proceedings had been dismissed (and inference that the issue of his being in bankruprty court moot). The court apparently gleaned this supposed information from the Secretary of Labor. However, Varknoyi has timely filed motion for new trial or hearing as to the dismissal of his Chapt. 11 proceedings and has or will appeal to the District Court in El Paso on this issue. In event, petitioner submits that it should be unimportant whether one is in a bankruptcy "state" - that is unable to pay one's bills,as opposed to being in the same "state" but having filed a petition in a U.S. Bankruptcy Court. Varkonyi was indeed in a bankruptcy "state" at the time of the initiation of the proceedings by the Seccy of Labor, but filed in Bankrupty court subsequently.

Lastly, petitioner argues that it was error for the Fifth Circuit to overturn a Trial Court decision, when the said Trial Court has discretion in the matter, and there is no showing of abuse of discretion. Petitioner has argued heretofore, and he again submits that the Trial Court did have discretion, to deny or grant a restitutionary injunction, in spite of the 3/24/83 opinion of the Fifth Circuit. It is well settled that an appellate court should not overturn a lower court's decision, when the lower court did have discretion, and there is no showing that there had been an abuse of discretion. Reference is made to 4 CJS Appeal & Error, where this law is summarized in Section 111, and on pp 304:

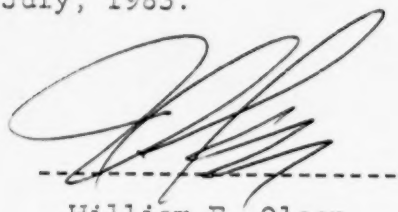
> "It is a general rule that an Appeal, Writ of Error, or Exceptions will not lie from or to the action of a court

> in the exercise of its purely discretionary power .....or unless, as will appear, there has been an abuse of discretion. "

CONCLUSION

It is respectfully submitted that the petitioner should be awarded the following relief; The petition should be granted; that the U.S. Supreme Court eventually remand to the Fifth Circuit ordering that the Trial Court's original judgment be sustained and reinstated with further instructions that if the Court of Appeals, 5th Circuit is not satisfied that there has been sufficient showing one way or another as to the "cause" that is required to be "shown" pursuant to 29 U.S.C. 217, then the Trial Court be instructed to make further findings as to such showing of cause, etc.

Respectfully submitted this 15th day of July, 1983.



William F. Olson
Counsel for petitioner
VARKONYI

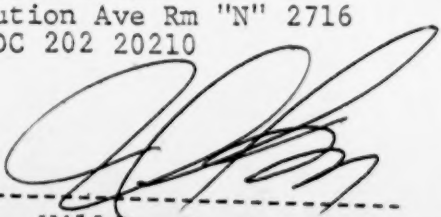
Certification of Service:

I hereby certify that on this 18th day of July, 1983 I mailed by first class mail, and made service, upon the following, a copy of the foregoing petition, to-wit:

Solicitor General
Dept of Justice
Washington D.C. 20530

United States Dept of Labor
Attn: Ms. Bobbie Gannaway
555 Griffin Square Building
Suite 501 DALLAS Tx 75202

United States Dept of Labor
Attn: Ms/ Beate Bloch
200 Constitution Ave Rm "N" 2716
Washington DC 202 20210



William F. Olson

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,	§	
v.	§	No.
THOMAS L. VARKONYI, Individually and d/b/a METAL RECYCLING COPMANY	§	EP-80-CA-164

AMENDED JUDGMENT

In accordance with the findings of Fact and Conclusions of Law signed and entered in this action on the 3rd day of November, 1981,

IT IS ORDERED, ADJUDGED and DECREED that the defendant, his agents,

servants, employees and all persons in active concert or participation with him be, and they hereby are, permanently enjoined and restrained from violating the provisions of §215(a)(1), 215(a)(2), 215(a)(4) and 215(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201, et seq., hereinafter referred to as the Act, in any of the following manners:

1. Defendant shall not, contrary to §§6 and 15(a)(2) of the Act,29 U.S.C. §§206 and 215(a)(2), pay any employee who is engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce or in the production of goods for commerece, within the meaning of the Act, wages as a rate

less than the minimum hourly rates required by §6 of the Act.

2.Defendant shall not, contrary to §§7 and 15(a)(2) of the Act, 29 U.S. C. §§207 and 215(a)(2) employ any employee in commerce or in the production of goods for commerce, or in any enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, unless the employee recevies compensation for his employment in excess of forty (40) hours, at a rate not less than one and one-half times the regular rate at which he is employed.

3. Defendant shall not, contrary to §§11(c) and 15(a)(5) of the Act, 29 U.S.C. §§211(c) and 215(a)(5), fail

to make, keep and preserve adequate and accurate records of the persons employed by him and the wages, hours and other conditions and practices of employment maintained by him as prescribed by regulations issued by the Administrator of the Employment Standards Administration, United States Department of Labor (29 C.F.R. Part 516).

4. Defendant shall not contrary to §§12(c) and 15(a)(5) of the Act, 29 U.S.C. §§212(c) and 215(a)(4), employ any oppressive child labor, as such term is defined in §3(l) of the Act, 29 U.S.C. §203(l) in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act

5. Defendant shall not, contrary to §15(a)(1) of the Act, 29 U.S.C. §215(a)(1), transport, offer for transporation, ship, deliver, or sell in commerce, or ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of §6 or 7 of the Act, 29U.S.C. §§206 or 207, or in violation of any regulation or order of the Secretary of Labor issued under §14 of the Act, 29 U.S. C. §214.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff RAYMOND J. DONOVAN recover from Defendant THOMAS L. VARKONYI the sum of TWENTY-EIGHT THOUSAND FIVE HUNDRED TWENTY-TWO and 54/100 DOLLARS ($28,522.54), bearing prejudgment and postjudgment interest at the legal rate. Prejudgment interest

shall be calculated from the date said compensation became due. The aforesaid amount of recovery shall be paid to Plaintiff DONOVAN by a cashier's or certified check payable to "Employment Standards Administration - Labor" in the total amount of backwages and interest due, less social security and income tax deductions, the proceeds of which check the Plaintiff shall distribute to Defendant's employees. Any net sums which within one year after the payment pursuant to this judgment have not been distributed to such employees, or their legally authorized representative, because of Plaintiff's inability to locate the proper persons, or because of their refusal to accept such sums, shall be

deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §2041.

IT IS FURTHER ORDERED that costs of this action be, and are hereby taxed against the Defendant, for which execution may issue.

SIGNED and ENTERED this 1st day of December, 1981.

/s/
LUCIUS D. BUTON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-1013

RAYMOND J. DONOVAN,
Secretary of Labor, United
States Department of Labor,

Plaintiff-Appellant,

versus

THOMAS L. VARKONYI,
Individually and
d/b/a Metal Recylcing
Co.,

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas

(March 24, 1983.)

Before RUBIN and TATE, Circuit Judges, and DAVIS* District Judge, RUBIN, Circuit Judge:

*District Judge of the Western District of Louisiana, sitting by designation.

Having determined that Thomas L. Varkonyi had violated the minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act, 29 U.S.C. §201 et seq., the District Court enjoined him from violating the FLSA in the future, ordered that the Secretary recover the amount determined to be due for back wages, but denied the Secretary's request for a restitutionary injunction. Finding that the district court improperly denied the restituionary injunction, we remanded so that the judgment may be amended to include such an injunction. 1/

1/ Following the date judgment was entered, Varkonyi filed a voluntary

petition in bankruptcy. However, this petition has now been dismissed.

Section 17 of the FLSA grants federal district courts jurisdiction "to restrain violations" of the FLSA, including "the restraint of any withholding of payment of minimum wages or overtime compensation" found to be due to employees. 29 U.S.C. §217 2/

2/ "The district courts. . . .shall have jurisdiction, for cause shown, to restrain violations of Section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation

found by the Court to be due to employees under this Act. . . ." 29 U.S.C. §217.

Section 17, by virtue of its double negative, in effect provides for an injunction requiring an employer to pay back wages. Donovan v. Brown Equipment & Service Tools, Inc., 666 F.2d 148 (5th Cir. 1982). The purpose of a restitutionary injunction is two-fold. It exacts the compensation due employees who have not received the wages required to be paid them under the statute and it also corrects "a continuing offense against the public interest". Marshall v. A & M Consolidated District, 605 F.2d 186, 189 (5th Cir. 1979) (quoting Wirtz

v. Jones, 340 F.2d 901, 904 (5th Cir. 1965)).

The district court merely entered a money judgment, denying the Secretary the equitable remedy that the statute entitles him to. The statute contemplates the additional force of an equitable remedy, which operates directly against the defendant and is enforceable through the use of the court's contempt power. Bradley v. United States, 214 F.2d 5, 7 (5th Cir. 1954)

In Brown Equipment, we held that the denial of a restitutionary injunction was an abuse of the Court's small residue of discretion. "(G)ood faith is immaterial, for requiring an employer to pay what is justly due its employees is not punishment . . . . . Present compliance is also no excuse,

for a restitutionary injunction is not designed to assure future compliance but merely to correct past dereliction." 666 F.2d at 157. In light of the purposes of the Act, an injunction against withholding back pay is virtually indispensible. Donovan v. Grantham, No 81-4478, slip op. at 420 (5th Cir., Nov 1, 1982) (citing Brown Equipment, 666 F.2d at 156.

However, restitutionary injunctions under the FLSA for withholding payment of minimum wages or overtime compensation found to be due to employees under the Act should not issue as a matter of course on a finding of past wages due. Brown Equipment, 666 F.2d at 157. If "the employer is bankrupt,

an injunction would be in vain and the employer should not be threatened with citation for contempt for not doing what he is unable to do." Id.

The defense raised against the restitutionary injunction is that Varkonyi has filed a petition for voluntary bankruptcy under Chapter 11 of the Bankruptcy Reform Act and, thus, is sheltered in that small area where the injunction may not reach him. The short answer is that,at the time judgment was entered, Varkonyi had not filed for bankruptcy. Therefore, the judgment was improperly withheld.

The Secretary properly conceded in his brief that he could not attempt to enforce the judgment during the pendency of a voluntary bankrputcy.

That proceeding has, however, been dismissed.

For these reasons, the case is REMANDED for entry of a restitutionary injunction in accorance with the statute, together with interest from the date of the original judgment and costs

* * * * * *

A petition for rehearing was timely filed, but denied.

* * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

v.

THOMAS L. VARKONYI, Individually and d/b/a Metal Recycling Company

No EP 80-CA-164

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action brought by the Secretary of Labor, United States Dept of Labor, to enjoin Defendant from violating the provisions of the Fair Labor Standards Act, 29 U.S.C. 201 et seq., and to restrain the withholding of payment to be due Defendant's employees.

This cause came on for trial before the Court on the 27th day of July, 1981. Having considered the

pleadings, the stipulations, the exhibits, the oral testimony of witnesses and the statements of counsel, and being fully advised in the premises of this matter, the Court makes and issues its findings of fact and conclusions of law separately stated as follows:

FINDINGS OF FACT

1. Plaintiff is RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor.

2. Defendant THOMAS L. VARKONYI is and has been during all relevant periods a resident of El Paso,El Paso County, Texas, which is within the jurisdiction of this Court. Since 1977, Defendant has been doing business as Metal Recycling Company. The permanent location of Defendant's business has been at 2505-2511 Texas Avenue, El Paso, Texas, since early 1978.

3. Defendant is primarily engaged in the recycling of scrap materials such as metal scrap, batteries, cardboard, paper, plastic scrap and electronic scrap. These materials are purchased by Defendant and stored at his warehouse where they are separated. sorted, cleaned, containarized and subsequently sold.

4. During the period since July 1, 1977, Defendant's general salarized employee staff consisted of secretaries, bookkeepers, warehouse foreman, warehousemen and truck drivers. These employees were legal residents of the United States. When hired, they were given the choice of either being paid as an employee or on a subcontract basis. The rate of pay and the job duties were the same regardless of the decision. If they chose to be paid as sub-contract labor, no income

tax or FICA deductions were taken from their pay. As a matter of economic fact, these workers, when they chose to be paid as sub-contract labor, were not in business for themsleves, but were Defendant's employees.

5. During the period since July 1, 1977, Defendant regularly employed non-skilled manual laborers in warehouse work, most of whom were Mexican aliens illegally in the United States. All of these workers were hired by Defendant as sub-contract Labor. However as a matter of economic reality, they were at all times Defendant's employees. They were totally depandent upon Defendant to provide direct and control in every major aspect of their work. All of their tools, equiment, materials and supplies

were furnished by defendant. They were paid for their work at either daily, weekly or hourly pay rates and were always treated as employees rather than independent businessmen.

6. Defendant is, through unified operation and common control, engaged in the performance of related activities for a common business purpose.

7. Defendant, during the period since January 1, 1979, has had employees engaged in commerce or in the production of goods for commerce, or employees handling, selling or otherwise working on goods or materials that have moved in or are produced for commerce and has had an annual gross volume of sales made or business done of not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated.)

8. During the period since July 1, 1977, Defendants employees have regularly engaged in the processing, recycling, manufacturing, production and handling of metals, plastics, cardboard and electronic scrap for shipment outside the State of Texas; in the receipt of said goods from places located outside the State of Texas; in the shipment of said goods to places outside the State of Texas; and in the necessary administrative and clerical work pertaining to the processing, sale and shipment of said goods and materials.

9. None of Defendant's employees during the period since July 1, 1977 were employed in a bona fide executive, administrative or professional capacity. Warehouse Supervisors were

working foremen who spent a substantial part of each workday performing general warehouse manuel labor work. Secretaries performed only general secretarial and clerical work of a routine nature. The employees which Defendant classified as controllers were merely bookkeepers whose work was constantly monitored and who exercised no discretion or independent judgment.

10. Defendant required his Mexican Alien employees to sleep in a storage room in his warehouse basement in order to maintain a stable workforce of manuel laborers. If these employees had been allowed to return to their homes in Mexico each night, Defendant would have run the risk of the employees either not being able to re-enter the United States, or being arrested by the U.S. Border Patrol. In addition, the

continual presence of these employees provided security for Defendant's warehouse.

11. Defendant kept no records pertaining to the actual cost of furnishing sleeping quarters to his Mexico alien employees or otherwise attempted to determine the actual cost. The sleeping quarters consisted of a small basement storage room with boarded-up windows where the employees slept crowded together on the floor either on scrap rags, carpet, foam, cardboard or no metal cots. The room was also used to store scrap metal. The sleeping quarters were furnished at minimal cost to defendant.

12. Defendant's subcontract manual labor employees, most of whom were Mexican Aliens, were not paid the applicable minimum wage for their work. Prior to

April, 1980, these employees were paid daily or weekly salaries which yielded hourly rates ranging from $0.50 per hour to $1.50 per hour, although the minimum wage was $2.30 per hour in 1977, $2.65 per hour in 1978, $2.90 per hour in 1979 and $3.10 per hour in 1980. From April, 1980 through December 1980 these employees were paid hour rates of $1.50 per hour. In 1981, they were paid hourly rates ranging from $1.50 per hour to $2.25 per hour, although the minimum wage was $3.35 per hour.

13. During the period since July 1, 1977, Defendant's general salaried employees such as secretaries and warehouse foremen regularly worked in excess of 40 hours per week. The approximate weekly work hours of these employees can be determined from Defendant's available records. Defendant failed to compensate these employees for their

employment in excess of 40 hours in a workweek at rates not less than one and one-half times the regular rates at which they were employed

14. During the period since July 1, 1977, Defendant's sub-contract manuel labor employees, most of whom were Mexican Aliens, regularly worked in excess of 40 hours per week. They worked a reconstructed weekly schedule of 60 hours per week prior to February 5, 1978, a reconstructed weekly schedule of 48 hours per week during the period February 5, 1978 to July 18, 1980, and a reconstr ucted weekly schedule of 68 hours per week during the period July 19, 1980 to December 24, 1980. Actual weekly workhours for

these employees during the period December 25, 1980 to July 18, 1981, can be determined by dividing gross weekly wages by actual hourly rates paid. Defendant failed to compensate these employees for their employment in excess of 40 hours in a workweek at rates not less than one and one-half the regular rates at which they were employed.

15. Defendant failed to make, keep and preserve required payroll records. Records of actual hours worked were not accurately maintained on any employee. Records of dates of birth were not maintained for employees under 19 years of age. The only accurate records maintained for Mexican alien employees were their names, gross weekly or daily wages and their pay advances.

Defendant was unable to produce even these records for certain time periods.

16. Defendant's general salaried employees are due overtime compensation in the amount of $5,652.74 for the period July 1, 1977 through July 18 1981. The names of these employees and the back wage amounts due each are contained in exhibi "A" attached hereto.

17.Defendant's identified manu l labor employees, most of whom were Mexican aliens are due $17,878.36 in minimum wages and overtime compensation for the period July 16, 1978 to March 15, 1980. The names of these employees and the back wage amounts due each are contained in exhibit "B" attached hereto.

18 Defendant's identified manual

labor employees, most of whom were Mexican aliens, are due $4,991.44 in minimum wages and overtime compensation for the period December 25, 1980 to July 18, 1981. The names of these employees and the back wage amounts due each are contained in Exhibit "C" attached hereto.

19. Defendant regularly produced scrap metal, plastic and paper products under conditions where the wage-hour standards of the Act were not observed which products were either shipped in commerce by Defendant or were sold by Defendant with knowledge that such goods were going to be shipped in commerce.

20. Defendant regularly employed minors under 14 years of age and other minors under 16 years of age in a manufacturing, processing, warehousing and storage business operation.

21. Defendant was investigated by the Department of Labor in January

and March, 1980. Although Defendant was made fully aware of the applicability of the Act to his business and his responsibilities under the minimum wage, overtime, child labor, and recordkeeping provisions, he has continued to violate the Act.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of the action under §217 of the Act [29 U.S.C. 217]. This action by the Secretary of Labor for an injunction to enforce compliance with the Act is not burdened by the employee suit requirements of §216 of the Act [29 U.S.C. 216; Hodgson v. Ewing, 451 F.2d 526 (5th Cir. 1971); see Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965)] nor is the Defendant entitled to a trial by jury [Wirtz v. Jones, supra].

2. Defendant is an employer within the meaning of §3(d) of the Act]29 U.S.C. 203(d)].

3. All individuals working for Defendant during the period since July 1, 1977 as "sub-contract" labor were Defendant's employees within the meaning of the Act [29 U.S.C 203(e) and 203(g); Donovan v. Tehco, 642 F.2d 141 (5th Cir. 1981)]. These employees could not contract away or waive the rights afforded to them by the Act [See Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308 (5th Cir. 1976), certi. den., 429 U.S. 826 (1976); cf. Brooklyn Savings Bank V. O'Neil, 324 U.S. 697 (1945), D.A. Schulte, Inc. v. gangi, 328 U.S. 108 (1946)].

4. As the "term 'employee' means any individual employed by an employer", Defendant's employees who illegally entered the United States from Mexico

to work were entitled to the wage and hour protections afforded by the Act [29 U.S.C. 202(a) and 203(e)].

5. During the period since January 1, 1979, Defendant has been an enterprise engaged in commerce or in the production of goods for commerce within the meaning of §§203(r) and 203(s)(1) of the Act [29 U.S.C. 203(r) and 203(s)(1); Brennan v. Hatton, 479 F.2d 9 (5th Cir. 1973); Brennan v. Wilson Building, Inc., 478 F.2d 1090 (5th Cir. 1973)].

6. During the period since July 1, 1977, Defendant's employees engaged in the processing, recycling, manufacturing, production and handling of metals, plastics, cardboard and electronic scrap for shipment outside the State of Texas; in the receipt of said goods from places outside the State of Texas; and in the shipment and transportation of said goods to

places located outside the State of Texas were engaged in commerce or in the production of goods for commerce within the meaning of §§203(b), 203(i) and 203(j) of the Act [29 U.S.C. 203(b), 203(i) and 203(i) and 203(j); Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943); Overnight Motor Co. v. Missel, 316 U.S. 572 (1942); Powell v. United States Cartridge, 331 U.S. 497 (1950; Borden Co. v. Borella, 325 U.S. 679 (1945); Roland Electrical Co. v. Walling, 326 U.S. 657 (1945); 29 C.F.R. 776].

7. Defendant failed to prove that any of his employees were employed in a bona fide executive, administrative or professional capacity within the meaning of §213(a) (1) of the Act [29 U.S.C. 213 (a)(1); see 29 C.F.R. Part 541; Arnold v. Ben Kanowsky, Inc. 361 U.S. 388 (1960)].

8. Defendant is not entitled to a wage credit pursuant to §203(m) for

sleeping quarters furnished certain of his employees as the sleeping quarters were provided primarily for the benefit and convenience of Defendant [29 U.S.C. 203(m); 29 C.F.R. 531.1(d)(1); see Masters v. Maryland Management Co., 493 F.2d 1329, 1334 (4th Cir. 1974); Marshall v. DeBord, 84 Lab. Cas ¶33,721 at 48,4765-48,476; Bailey v. Pilots Ass'n. 406 F. Supp. 1302, 1309 (E.D. Pa. 1976)].

9. During the period since July 1, 1977, Defendant has continuously violated the minimum wage provisions of §§206 and 215(a)(2) of the Act [29 U.S.C. 206 and 215 (a)(2)].

10. During the period since July 1, 1977, Defendant has continuously violated the overtime provisions of §§207 and 215(a)(2) of the Act [29 U.S.C. 207 and 215 (a)(2)].

11. the violations of §§206, 207 and 215(a)(2) of the Act were willful within the meaning of §6 of the Portal-to-

Portal Act [29 U.S.C. 255; Coleman v. Jiffy June Farm, Inc., 458 F.2d 1139 (1972); brennan v. Heard, 491 F.2d 1, 3 (5th Cir. 1974); Marshall v. Presidio Valley Farms, Inc., 512 F. Supp. 1195, 1198 (W.D. Tex. 1981)].

12. During the period since July 1, 1977, Defendant has continuously violated the recordkeeping provisions of §§211(c) and 215(a)(5) of the Act [29 U.S.C. 211(c) and 215(a)(5)].

13. Plaintiff has proven Defendant's employees, during the period since July 1, 1977, performed work for which they were improperly compensated and has produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference" [Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)]. The evidence is sufficient to support minimum wage and overtime back wage findings for all Defendant's identified

employees [See Brennan v. General Motors Acceptance Corporation, 482 F.2d 825, 829 (5th Cir. 1973)].

14. During the period since July 1, 1977, Defendant has continuously violated the provisions of §215(a)(1) of the Act [29 U.S.C. 215(a)(1); United States v. Darby, 312 U.S. 100 (1941); Mabee v. White Plains Pub. Co., 327 U.S. 178 (1946); 29 C.F.R. Part 789].

15. During the period since July 1, 1977, Defendant has continuously violated the child labor provisions of §§212 (c) and 215(a)(4) of the Act. [29 U.S.C. 212(c) and 215(a)(4); Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508 (5th Cir. 1969)].

16. Plaintiff is entitled to an injunction permanently enjoining Defendant THOMAS L. VARKONYI from violating the provisions of §§215(a)(1), 215(a)(2), 215(a)(4), and 215(a)(5) of the Fair Labor

Standards Act [29 U.S.C. 125(a)(1), 215 (a)(2), 215(a)(4) and 215(a)(5); Goldberg v. Cockrell, 303 F.2d 811 (5th Cir. 1962); Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508 (5th Cir. 1969); Schultz v. Hinojosa, 432 F.2d 259 (5th Cir. 1970); Marshall v. Presidio Valley Farms, 512 F.Supp. 1195 (W.D. Tex. 1981)].

SIGNED and ENTERED this 3rd day of November, 1981.

/S/

LUCIUS D. BUNTON
United States District Judge

Elena Alejo, $18.75; Rose Carrilo, $256.20; George L. Espinoza, $14.00; Stanley Frazier, $252.32; Roberto Javier Giovine, $195.36; Cathy Gutierrez, $29.16; Rosalio Hernandez,$162.64; Minerva G. Leon, $37.50; Patricia Luna, $75.81; Frank Maple, $251.90; Magdalena R. Nevarez,$112.93; JOhn Ohnmacht, $165.52; Isidro Perez, Sr.,$971.44; Susan M. Ramos, $12,56; Rosa Mary Bocanecro Ramirez, $182.78; Rodolfo Robles, $123.18; Barbara Rodriguez, $86.58; Richard L. Santoscoy, $234.64; Dora A. Villanueva, $56.73; Uranga Corrine, $56.73; Margarita Escobar, $37.60; Mike Workman, $95.86; Sylvia Herrera, $104.34; Donala Smailes, $520.81; Robert Campbell, $67.48; Oscar Hernandez, $193.43; Richard Carrillo, $138.38; Jose Vasquez, $59.64; Erasmo Gonzalez, $80.65; Manuel Pena, $47.21; Diane Campos, $50.24; Jose Ruiz, $113.22; Leslie Ladanyi, $188.70; JoseBrunda, $137.64; Alma Briones, $171.42;

$5,652.74

Felipe Lujan, $886.80; Placido Lopez Padillo, $1,136.00; Manuel Medrano, $146.80; Oscar Lozano, $37.10; Vicente Lopez, $273.20; Adolfo Lujan, $1,623.95; Reynaldo Ramos, $1,812.62; Enrique Arrieta, $1,409.89; Rosalio Bahena, $73.72; Eloy Cossio, $297.41; Rigoberto Duarte, $10.56; Manuel Esparza, $355.28; Oscar Esparza, $1,226.49; Mario Fierros Hernandez, $261.79; Mario Gallardo, $146.40; Cruz Galvan, $51.06; Isaias Garay,$116.04; Santiago Jimenez, $78.38; Armando Lopez,$23.52; Aurelio Lopez, $171.84; Manuel Lopez, $134.88; Enrique Lujan, $788.03; Patricio Lujan, $446.58; Silvestre Lujan, $73.23; Juan Marquez, $57.85 Benito Martel, $57.85; Miguel Medrado, $544.56; Pascual Medrano, $104.44; Roberto Medrado Agulera, $54.59; Angel Mejia, $13.17; Alberto Morales, $20.64; Andres Morales, $67.22; David Nava, $8.40; Arnulfo Navarro, $197.90; Jesus Ochoa, $538.03; Francisco Orasco R., $211.33; Oscar Orozco, $74.24; Manuel Paez, $91.22; Ruben Penaflor, $21.92; Maximo ramirez, $495.23; Jesus reyez, $164.93; Luis Reyez, $11.26; Enrique robledo, $13.76; Javier Robledo, $67.22; Alejandro Rocha, $243.23; Felipe Saigado, $20.48; Ernesto Trejo, $103.20; Fernando Trejo, $10.32; Jesus Trejo, $10.32; Alberto Vaidez, $44.29; Humberto Velasquez Martinez, $29.18; Reynaldo Velasquez, $50.69; Juan Salgado, $171.87; Pedro Silva, $160.80;

Arturo Terrazas Avila, $25.88; Antonio Torres, $74.20; Juan Torres, $308.36; Patricia Martin, $7.28; Marta Fabela, $7.18; Esperanza Fabela, $7.28; George Gonzales $8.28.

Total Due----------$ 17,878.36

Luis Medrano, $612.10; Graciano Medrano, $9.62; Rodalfo Martinez, $349.93; Javier Martinez, $11.40; Guillermo Martinez, $152.14; Francisco Hernandez, $616.76; Ruben Guzman, $528.13; Juan Guzman, $187.76; Jesus Guzman, $28.28; Abraham Cossio, $41.54; Manuel Medrano, $155.29; Carlos Chihuahua, $1,087.98; Oscar Aguero, $.33; Jose Angel Soto, $255.18; Martin Silva, $12.89; Jesus Silva, $72.79; Juan Torres, $169.03; Pedro M. Rodriguez, $13.69; Teodoro Ramirez, $34.63; Alonso Parra, $157.20; Manuel Nunez, $25.01; Elucterio Nunez, $323.66; Arturo Nunez, $142.60.

Total Due----$ 4,991.94

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No. 83-99

In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS L. VARKONYI, INDIVIDUALLY AND d/b/a METAL RECYCLING COMPANY, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals correctly held that the district court abused its discretion in denying the Secretary of Labor's request for a restitutionary injunction requiring the payment of wages wrongfully withheld under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-15a) is reported at 703 F.2d 555 (table). The opinion and amended judgment of the district court (Pet. App. 1a-7a, 16a-36a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1983, and a petition for rehearing was denied on April 20, 1983 (First Amended Pet. App.). The petition for a writ of certiorari was filed on July 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is engaged in the business of collecting, processing, recycling, and selling scrap materials in El Paso, Texas (Pet. App. 18a). Between 1977 and 1981, he employed citizens and legal residents of the United States on a salaried basis as secretaries, bookkeepers, warehouse foremen, warehousemen, and truck drivers (*ibid.*). Petitioner also employed non-skilled manual laborers, most of whom were illegal aliens from Mexico, to work in his warehouse (*id.* at 19a).[1] Although all of petitioner's employees regularly worked more than 40 hours per week, none of them was paid the premium rate of pay required by the Fair Labor Standards Act (FLSA) for overtime work (Pet. App. 24a-26a). Petitioner also failed, in any year between 1977 and 1981, to pay his manual laborers the statutory minimum wage (*id.* at 23a). Finally, he failed to keep adequate records of the number of hours his employees worked, as required by the Act (*id.* at 26a-27a).

The Secretary of Labor brought this action in the United States District Court for the Western District of Texas pursuant to Section 17 of the FLSA, 29 U.S.C. 217, to enjoin petitioner from violating the minimum wage, overtime, recordkeeping, child labor, and "hot goods" provisions of the Act, and from withholding back wages due some of the employees.[2] Following trial, the district court

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[1]Petitioner housed the illegal aliens in the warehouse basement. Pet. App. 22a. He has been convicted of harboring illegal aliens and assaulting an Immigration and Naturalization Service officer, *United States* v. *Varkonyi*, 645 F.2d 453 (5th Cir. 1981), and of obstruction of justice, *United States* v. *Varkonyi*, 611 F.2d 84 (5th Cir.), cert. denied, 446 U.S. 945 (1980).

[2]29 U.S.C. 217 provides in pertinent part:

> The district courts * * * shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the

found that certain identified salaried employees were due $5,652.74 in unpaid overtime compensation and that certain identified manual laborers were due $22,869.80 in unpaid minimum wages and overtime compensation (Pet. App. 27a-28a). Accordingly, the court ordered the Secretary to recover from petitioner $28,522.54 plus prejudgment and postjudgment interest and enjoined petitioner from violating the FLSA in the future (Pet. App. 1a-7a, 35a-36a). The Secretary filed postjudgment motions requesting, *inter alia*, that the form of the back wage judgment be changed from a legal monetary award to an equitable restitutionary injunction as provided in Section 17 of the Act. The district court, without explanation, declined to revise its judgment.

On May 11, 1982, subsequent to the entry of the district court's judgment, petitioner filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Reform Act, 11 U.S.C. (Supp. V) 101 *et seq.* On March 14, 1983, the bankruptcy judge dismissed the petition on the grounds that petitioner's proposed plan discriminated unfairly against the Department of Labor, petitioner's "admitted purpose in instituting this action was to discharge the claim of the Department of Labor," and petitioner had brought the bankruptcy action in bad faith. App., *infra*, 1a-5a. Petitioner's appeal from the dismissal of his bankruptcy petition is pending.

In the interim, the court of appeals reversed the district court's judgment denying the Secretary's request for a restitutionary injunction. Pet. App. 8a-15a. The court first observed that the purpose of a restitutionary injunction is two-fold: to compensate employees for wages due them and

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restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter * * *.

to correct " 'a continuing offense against the public interest.' " Pet. App. 11a, quoting *Marshall* v. *A & M Consolidated Independent School District*, 605 F.2d 186, 189 (5th Cir. 1979), and *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965). While acknowledging (Pet. App. 13a) that restitutionary injunctions under the FLSA "should not issue as a matter of course on a finding of past wages due," the court noted (*id.* at 12a) that the scope of a district court's discretion to deny an injunction is "small." Because the district court failed to offer any valid reason to deny an injunction in this case,[3] the court of appeals ruled (*id.* at 14a) that the district court had "improperly withheld" the appropriate equitable remedy.

ARGUMENT

The decision of the court of appeals represents a routine application of well-settled principles governing the award of restitutionary injunctions under the Fair Labor Standards Act to the particular facts of this case. Moreover, the decision below is clearly correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. In granting the Secretary's request for a restitutionary injunction, the court of appeals correctly noted that this form of relief serves two legitimate legislative purposes: it compensates employees for the losses they sustained, and it protects the public interest by depriving the violator of his

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[3]The court of appeals rejected petitioner's claim that his voluntary bankruptcy petition precluded issuance of a restitutionary injunction. Pet. App. 14a. The court of appeals stated (*ibid.*) that the bankruptcy petition was not filed until after the district court's decision, and thus it could not have provided a basis for that court's refusal to issue a restitutionary injunction. The court of appeals also observed (*ibid.*) that the Secretary would be unable to enforce its judgment against petitioner while the bankruptcy action was pending. Finally, the court noted (*id.* at 15a) that the bankruptcy proceeding had been dismissed.

unjust enrichment and by preventing him from competing unfairly with employers who comply with the FLSA.[4]

The court of appeals recognized (Pet. App. 13a) that district courts retain some discretion in issuing restitutionary injunctions under Section 17.[5] The court of appeals correctly concluded (Pet. App 12a-13a), however, that, in view of the Act's purposes, once an employer is found to have violated the statute the scope of that discretion is narrow. See, *e.g.*, *Donovan* v. *Grantham*, 690 F.2d 453, 456-457 (5th Cir. 1982); *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 157 & n.14 (5th Cir. 1982); *Marshall* v. *Chala Enterprises, Inc.*, 645 F.2d 799, 802 (9th Cir. 1981). Cf. *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 296 (1960) ("because of what we have found to be the statutory purposes there is doubtless little room for the exercise of discretion * * *").[6]

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[4]See, *e.g.*, *Donovan* v. *Grantham*, 690 F.2d 453, 456 (5th Cir. 1982); *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 156-157 (5th Cir. 1982); *Marshall* v. *Chala Enterprises, Inc.*, 645 F.2d 799, 802-803 (9th Cir. 1981); *Marshall* v. *Van Matre*, 634 F.2d 1115, 1118 (8th Cir. 1980); *Marshall* v. *A & M Consolidated Independent School District*, 605 F.2d 186, 189-190 (5th Cir. 1979); *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971); *Shultz* v. *Mistletoe Express Service, Inc.*, 434 F.2d 1267, 1272-1273 (10th Cir. 1970); *Wirtz* v. *Malthor, Inc.*, 340 F.2d. 901, 904-905 (9th Cir. 1965).

[5]Petitioner incorrectly suggests (Pet. i, 11, 19) that the court of appeals assumed that the district courts lack discretion to refuse to issue restitutionary injunctions. To the contrary, the court of appeals expressly acknowledged (Pet. App. 13a) that such relief "should not issue as a matter of course on a finding of past wages due" and reviewed the district court's action to determine whether it had abused its discretion in refusing the Secretary's request for a restitutionary injunction.

[6]Petitioner cites eight cases (Pet. 13-14) for the proposition (Pet. 13) that "the Federal Courts have broad discretion to grant or to deny injunctive relief in this area." Petitioner's reliance on these cases is misplaced, however, since each of the cases involved the issuance of prospective, rather than restitutionary, injunctive relief. The two types of injunctions are governed by different standards. See *Donovan* v. *Brown Equipment & Service Tools, Inc.*, *supra*, 666 F.2d at 158.

Here, the district court concluded that petitioner had illegally withheld from his workers $28,522.74 in unpaid minimum wages and overtime compensation.[7] Moreover, the court offered no reason for refusing the equitable remedy authorized by Section 17 of the Act. In these circumstances, the court of appeals correctly held that the district court abused its discretion in denying the Secretary's request for a restitutionary injunction and properly remanded the case for entry of an award of such relief (*id.* at 15a).[8] This ruling is in accord with the overwhelming weight of the case law that has considered the propriety of issuing restitutionary injunctions under Section 17.[9]

2. The only justification petitioner offers (Pet. 18) for the denial of a restitutionary injunction is his asserted bankruptcy. But this defense is inadequate for several reasons.

In the first place, an employer's financial difficulties affect the enforceability of an injunction, not its availability. See *Hodgson* v. *A-1 Ambulance Service, Inc.*, 455

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[7]Petitioner contends (Pet. 14-15) that the court of appeals' holding ignores the statutory requirement that injunctions issue only for "cause shown." But this requirement of Section 17 is plainly satisfied by the restitution due petitioner's employees for the wages illegally withheld from them.

[8]The district court entered a legal judgment for back pay even though Section 17 of the Act, under which this action was brought, grants district courts jurisdiction only to issue injunctive relief, including restitutionary injunctions. Because nothing in Section 17 permits district courts to substitute other remedies for the restitutionary injunction that Congress explicitly chose, the court of appeals acted properly in correcting the form of judgment.

[9]See, *e.g.*, cases cited in note 4, *supra*. The Ninth Circuit's affirmance of the denial of a restitutionary injunction in *Brennan* v. *Saghatelian*, 514 F.2d 619, on denial of motion for reconsideration, *Dunlop* v. *Saghatelian*, 520 F.2d 788 (1975), has since been confined to the "extreme set of facts" involved in that case. *Marshall* v. *Chala Enterprises, Inc.*, *supra*, 645 F.2d at 803 & n.9; *Marshall* v. *Valhalla Inn*, 590 F.2d 306, 308 (9th Cir. 1979).

F.2d 372, 374-375 (8th Cir. 1972); *Hodgson* v. *Hotard*, 436 F.2d 1110 (5th Cir. 1971). In addition, the Bankruptcy Reform Act deals with all "right[s] to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, * * * legal, equitable, secured or unsecured." 11 U.S.C. (Supp. V) 101(4)(A). Hence, if an individual is adjudged "bankrupt" by the bankruptcy court, any enforcement of a restitutionary injunction will be determined by that court. Assuming arguendo, therefore, that petitioner was bankrupt when the Secretary brought this action, the Secretary nevertheless was entitled to obtain an injunction even though he would have had to resort to the bankruptcy system in order to enforce it. Cf. *Nathanson, Trustee in Bankruptcy* v. *NLRB*, 344 U.S. 25 (1952).

Moreover, petitioner had not even claimed to be bankrupt at the time the Secretary brought this action, or even at the time the district court entered judgment. Accordingly, as the court of appeals noted (Pet. App. 14a), petitioner's alleged bankruptcy could not have been the basis for the district court's decision. Finally, even after the district court's judgment was entered, petitioner never established that he actually was bankrupt. Indeed, the bankruptcy court dismissed petitioner's voluntary petition, stating that he had brought the action in bad faith. App., *infra*, 4a. The court of appeals therefore acted properly in remanding for issuance of an injunction rather than accepting petitioner's unsubstantiated allegations of bankruptcy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Department of Labor

AUGUST 1983

DOJ-1983-08

APPENDIX

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

THOMAS VARKONYI, d/b/a METAL RECYCLING COMPANY and UNIQUE PRODUCTS INTERNATIONAL,	)	Civil Action File
	)	No. 11-3-82-00202
Debtor.	)	

ORDER OF DISMISSAL

In accordance with the Findings of Fact and Conclusions of Law signed and entered in this action on the 14th day of March, 1983,

IT IS ORDERED, ADJUDGED AND DECREED that the above named and numbered cause be and it hereby is dismissed with prejudice with costs to be taxed against the debtor for which execution may lie.

Signed and entered this 14th day of March, 1983.

/s/ Bert W. Thompson

BERT W. THOMPSON
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

THOMAS VARKONYI, d/b/a METAL RECYCLING COMPANY and UNIQUE PRODUCTS INTERNATIONAL,	)	Civil Action File
	)	No. 11-3-82-00202
Debtor.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court pursuant to a motion filed by the Secretary of Labor, United States Department of Labor, to dismiss the above named and numbered cause.

Said motion to dismiss came on for hearing before the Court on the 23rd day of February, 1981 following notice to creditors and other parties in interest. Having considered the pleadings, the exhibits, the oral testimony of witnesses and the statements of counsel, and being fully advised in the premises of this matter, the Court makes and issues its findings of fact and conclusions of law separately stated as follows:

FINDINGS OF FACT

1. Thomas L. Varkonyi, an individual owning and operating a business with a trade style of Metal Recycling Company, whose principal place of business is located at 2505-2511 Texas Avenue, El Paso, Texas, filed with the Court on May 11, 1982, a *Debtor's Voluntary Petition* pursuant to Chapter Eleven (11) of the Bankruptcy Reform Act.

2. Raymond J. Donovan, Secretary of Labor, United States Department of Labor, is a creditor of the debtor, and is holder of a United States District Court Judgment entered on December 1, 1981 and filed December 4, 1981 awarding him the sum of $28,522.54 plus pre and post-judgment interest, plus costs of the action under which the Judgment arose.

3. The aforestated amount of recovery awarded to the Department of Labor represents a recovery of past due wages earned by Mr. Varkonyi's employees for work performed for the period July 1, 1977 to July 26, 1981 but withheld by Mr. Varkonyi from his employees in violation of §§ 6, 7 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*

4. The debtor has filed an Original Proposed Plan, a First Amended Proposed Plan, and a Second Amended Proposed Plan to date all of which make no provision for payment to the Department of Labor of any kind.

5. Mr Varkonyi has continued to pay each of the secured and unsecured creditors named in Class One, Class Two, Class Three and Class Four of his Second Amended Proposed Plan payment in full of every debt as it matures.

6. Mr. Varkonyi has approached each of the secured and unsecured creditors named in Class One, Class Two, Class Three and Class Four of his Second Amended Proposed Plan and has assured them continued payment in accordance with the original terms of his agreement with each.

7. No creditor named in Class Five or Class Six of the debtor's Second Amended Proposed Plan, other than the Department of Labor, has a claim reduced to Judgment.

8. The Department of Labor's claim represents the only non-contested claim for which the debtor has not made provisions for payment.

9. The debtor's proposed plan discriminates unfairly and is not fair and equitable with respect to the claim of the Department of Labor.

10. The debtor's admitted purpose in instituting this action was to discharge the claim of the Department of Labor.

11. The debtor has not brought this action in good faith.

12. The debtor has filed only the minimal amount of material possible to invoke the jurisdiction of this court and has engaged in unreasonable delays in the pursuit of this action to the prejudice of the Department of Labor.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this action.

2. The debtor's Second Amended Proposed Plan does not make clear that the interests of the creditors identified in Class Four of said plan would not be impaired as is required by 11 U.S.C. § 1123(a)(2).

3. The debtor has made payments and promised payment to certain creditors in connection with this case and in connection with the Second Amended Proposed Plan which were not disclosed to the Court in violation of 11 U.S.C. § 1129(4)(A).

4. The debtor's Second Amended Proposed Plan does not meet the requirements of 11 U.S.C. § 1129 in that it discriminates unfairly and is not fair and equitable with respect to the claim of the Department of Labor.

5. There has been an unreasonable delay by the debtor that has prejudiced the Department of Labor within the meaning of 11 U.S.C. § 1112(b)(3).

6. The Department of Labor is entitled to an Order granting its motion to dismiss and dismissing this action with prejudice with costs to be taxed against the debtor for which execution may lie.

/s/ Bert W. Thompson

BERT W. THOMPSON
United States Bankruptcy Judge

SOL Case No. 18164